



ASSOCIATION OF
RESEARCH LIBRARIES



REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE TO THE COPYRIGHT OFFICE’S NOTICE OF INQUIRY CONCERNING ORPHAN WORKS AND MASS DIGITIZATION

The significant diversity of opinion expressed in the initial comments submitted in the response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization indicates that it will be extremely difficult to forge a consensus approach to these issues. In contrast, during the Copyright Office’s study that led to the Office’s 2006 Orphan Works Report, a consensus emerged concerning both the existence of an orphan works problem and the nature of an appropriate legislative solution.

In the initial round of this inquiry, numerous rights holders opined that, at least for their categories of works, users had little difficulty locating rights holders. Because of the existence of registries, databases, or copyright notices affixed to copies, these works were rarely, if ever, orphaned, leading to the assertion that the orphan works problem was “vastly overstated.” (Comments of Authors Guild. *See also* Comments of American Society of Composers, Authors, and Publishers, Motion Picture Association of America, National Music Publishers’ Association, National Writers Union, SESAC, American Photographic Artists.)¹

Among the commenters that acknowledged the difficulty of identifying and locating rights holders, many generally agreed with LCA’s view that fair use offers the most productive way forward, at least for libraries, archives, and other cultural institutions. (*See, e.g.*, Comments of University of California Libraries, Duke University

¹ These reply comments of necessity simplify the nuanced positions articulated by many of the commenters. In this vein, we note that some of the comments that referenced LCA’s initial comments oversimplified our argument.

Libraries, Emory University Libraries, Massachusetts Institute of Technology Libraries, North Carolina State University Libraries, University of Michigan Library, University of North Carolina-Chapel Hill Libraries, Berkeley Digital Library Copyright Project.) Other cultural institutions and their representatives, however, believed that fair use was insufficient and legislative reform was needed. (*See, e.g.*, Comments of Library of Congress, Association of American Law Libraries, Art Institute of Chicago, Carnegie Mellon University Libraries, Rutgers University Libraries, Dance Heritage Coalition, Museum of Fine Arts in Boston.)

The proponents of legislation offered a wide range of possible solutions. Some endorsed the basic approach of the orphan works legislation in the 109th and 110th Congresses, *i.e.*, a limitation on remedies when a user conducted a reasonably diligent search (RDS). (*See, e.g.*, Comments of Association of American Publishers, American Intellectual Property Law Association, Copyright Alliance, Digital Media Association, Electronic Frontier Foundation, International Association of Scientific, Technical & Medical Publishers, International Documentary Association, Magazine Publishers of America.) Others wanted to narrow the RDS approach in some manner, either by limiting it to non-commercial users (*See, e.g.*, Comments of American Association of Independent Music, American Society of Media Photographers, ArtisitsUndertheDome.org, Graphic Artists Guild, Illustrators Partnership of America), erecting additional procedural hurdles, such as a notice of use requirement or payment into an escrow fund (*See, e.g.*, Comments of the Recording Industry Association of America, Independent Film & Television Alliance, National Press Photographers Association, Science Fiction and Fantasy Writers

of America), and restricting it to certain categories of works, as does the EU Orphan Works Directive. (*See, e.g.*, Comments of Artists Rights Society.)

Many commenters suggested alternatives to the previous RDS approach. For example, some commenters argued that orphan works relief for libraries, archives, and museums should be addressed in the context of section 108 reform. (*See, e.g.*, Comments of Picture Archive Council of America.) A variation of this idea was a safe harbor for public-minded mass digitization. (Comments of Microsoft.) Other commenters saw orphan works as a symptom of deeper problems in the Copyright Act and proposed broader reform of the statutory damages provision in 17 U.S.C. § 504(c)(2). (Comments of Computer & Communications Industry Association.) Still others proposed more technical solutions, such as permitting statutory damages only if the rights holder's current contact information is available in an electronically searchable Copyright Office database. (Comments of Google. *See also* Comments of Society of American Archivists.) In contrast, more general proposals were introduced, including the importation of duty of care from the common law. (Comments of Internet Archive.)


For their part, some rights holders proposed adoption of European-style extended collective licensing arrangements. (*See, e.g.*, Comments of American Society of Journalists and Authors, American Society of Illustrators Partnership, Institute for Intellectual Property & Social Justice.) Others proposed adoption of the Canadian system of a government granted license. (Comments of Atlantic Feature Syndicate.)

At the same time, performers, writers, and directors who have no current copyright interest argued that they should have control over the use of an orphan work they helped create. (*See, e.g.*, Comments of the American Federation of Musicians of the

United States and Canada, Directors Guild of America, Future of Music Coalition, Screen Actors Guild-American Federation of Television and Radio Artists.)

In short, the comments are literally all over the map. There is less agreement now than six years ago, both on the existence of a problem and the best approach to solve it. In light of these fundamental disagreements, LCA recommends that the Copyright Office pursue non-legislative solutions such as continuing to make the Copyright Office records more accessible. Moreover, the Office should seek to bolster fair use in both judicial and international fora. If the Copyright Office does decide to recommend a legislative solution, the only approach likely to achieve consensus is, as we suggested in our initial comments, a one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'J. Band', written in a cursive style.

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